

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE VODOPYANOV and ANATOLY
MANT,

UNPUBLISHED
June 12, 2008

Plaintiffs-Appellees,

v

No. 274460
Oakland Circuit Court
LC No. 06-076762-CK

KELLER WILLIAMS REALTY NORTHVILLE
MARKET CENTER, a/k/a NORTHVILLE
MARKET CENTER,

Defendant-Appellant,

and

MARINA SHEFFER, a/k/a MARINA VALTSEV,
ALEX VALTSEV, and RAPID ENTERPRISES,
L.L.C.,

Defendants.

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant Keller Williams Realty Northville Market Center¹ appeals by leave granted from two circuit court orders. The first order denied defendant's motion to set aside a default pursuant to MCR 2.603(D). The second order denied defendant's motion for relief pursuant to MCR 2.612(C). We affirm.

Plaintiffs filed this action in August 2006, to recover funds that allegedly were used as an earnest money deposit for a real estate transaction. Plaintiffs alleged that defendant improperly released the funds to a third party after the transaction failed to close. Plaintiffs' complaint was

¹ Although there are other defendants in this action, defendant Keller Williams Realty is the only party-defendant involved in this appeal. Therefore, the singular term "defendant" is used to refer to defendant Keller Williams Realty.

personally served on defendant on August 31, 2006. Defendant did not file an answer or otherwise respond within 21 days as required by MCR 2.108(A)(1). On September 25, 2006, a default was entered against defendant. On September 27, 2006, defendant filed a motion alleging that there was good cause to set aside the default because its attorney mistakenly believed that service was accomplished by certified mail, thereby giving it an additional week to respond to plaintiffs' complaint. Defendant also filed an affidavit averring that it had a meritorious defense to plaintiffs' action. The trial court determined that counsel's mistake or inadvertence was insufficient to establish good cause and, therefore, denied defendant's motion. Defendant subsequently filed a motion requesting relief under MCR 2.612(C)(f), which the trial court also denied.

On appeal, defendant first argues that the trial court failed to exercise its discretion to determine whether there was good cause to set aside the default. Defendant additionally argues that, under the circumstances, a decision to set aside the default would not have been an abuse of discretion.

"[A]lthough the law favors the determination of claims on the merits, ... it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (Internal citation omitted). A trial court's decision whether to set aside a default is reviewed for an abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.603(D)(1) provides that "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." "The good cause inquiry is satisfied if there is a substantial irregularity or defect in the proceeding on which the default is based or a reasonable excuse for failure to comply with the requirements that created the default." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 531; 672 NW2d 181 (2003). "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent manifest injustice." *Alken-Ziegler, Inc, supra* at 233-234.

The record does not support defendant's argument that the trial court failed to recognize its discretion to set aside the default for good cause. In support of this argument, defendant relies on the trial court's statement, "It appears harsh, but these rules of court are not discretionary." Defendant has taken this remark out of context. The trial court made this remark when referring to the procedure for entering a default initially. As the trial court observed, MCR 2.603(A) provides that if a party fails to plead or otherwise defend as provided by the court rules, the court clerk, on application of another party, "must enter" the default of the nonresponding party. The trial court thereafter discussed its authority to relieve a party from a default upon a showing of good cause and a meritorious defense, and it discussed these separate requirements. It is clear from the trial court's comments and analysis that it was aware of its discretion to set aside the default and that it exercised that discretion. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 651; 617 NW2d 373 (2000).

We also conclude that the trial court did not abuse its discretion in determining that defendant failed to establish good cause to set aside the default. The sole reason offered for the

delay was counsel's mistaken belief regarding the manner of service, which led counsel to believe that defendant had more time to respond to plaintiffs' complaint. Whether an attorney's act of neglect is excusable is a matter for the trial court to decide. *Muntean v Detroit*, 143 Mich App 500, 507, 510; 372 NW2d 348 (1985). The trial court determined that counsel's miscalculation of the time allowed for filing a response could only be attributable to counsel's inexcusable failure to determine the type of service, which was insufficient to establish good cause. See *Alken-Ziegler, Inc, supra* at 233-234. As the trial court observed, the negligence of counsel generally does not constitute good cause to set aside a default. *White v Sadler*, 350 Mich 511, 522; 87 NW2d 192 (1957); *Park v American Cas Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996).

In light of the state's policy against setting aside a default that has been properly entered, the fact that nothing prevented counsel from determining the manner of service for purposes of calculating when a response was required to be filed, and that attorney neglect is generally regarded as insufficient to establish good cause, the trial court did not abuse its discretion in denying defendant's motion to set aside the default pursuant to MCR 2.603(D).

Defendant also argues that the trial court abused its discretion in denying its motion for relief under MCR 2.612(C)(f). Again, we review the trial court's decision for an abuse of discretion. *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007).

MCR 2.612(C) provides, in pertinent part:

On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

* * *

(f) Any other reason justifying relief from the operation of the judgment.

"In order for relief to be granted under MCR 2.116(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999). "Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *Id.*

Here, the trial court determined that relief was not appropriate pursuant to MCR 2.612(C)(1)(f), because it had previously concluded that there was no excusable neglect for defendant's failure to timely respond. The court also found that there were no extraordinary circumstances justifying relief. As the trial court appropriately stated, "It can't be that a mistake is not good cause under MCR 2.603 but constitutes a reason to set aside under MCR 2.612." Contrary to what defendant argues, the trial court did not fail to exercise its discretion, but rather

examined the circumstances of the case and concluded that they did not rise to a level justifying relief under MCR 2.612(C)(1)(f). The trial court did not abuse its discretion in denying defendant's motion for relief under MCR 2.612(C)(1)(f).

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood